No. 10-933

In the Supreme Court of the United States

MAXINE ELIZABETH WELLINGTON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, assuming a federal conviction for simple drug possession that has been expunged in accordance with the Federal First Offender Act (FFOA), 18 U.S.C. 3607, does not qualify as a "conviction" for immigration purposes, an expunged state conviction for simple drug possession must be treated in the same manner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 623 F.3d 115. The decisions of the Board of Immigration Appeals (Pet. App. 19a-22a) and the immigration judge (Pet. App. 23a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2010. The petition for a writ of certiorari was filed on January 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, Congress enacted the Federal First Offender Act (FFOA), 18 U.S.C. 3607. Under that law, if a person is found guilty of a federal offense involving simple possession of a controlled substance in violation

of 21 U.S.C. 844, and that person has no prior drug convictions and has not previously had a case disposed of under the FFOA, the district court may place him or her on probation "for a term of not more than one year without entering a judgment of conviction." 18 U.S.C. 3607(a). If, at the end of the term of probation, the person has not violated any condition of probation, "the court shall, *without entering a judgment of conviction*, dismiss the proceedings against the person and discharge him from probation." *Ibid.* (emphasis added). If a conviction is thus expunged under the FFOA, it "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. 3607(b).

Aliens convicted of certain drug offenses face a number of immigration consequences. For example, an alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [21 U.S.C. 802])" is inadmissible, 8 U.S.C. 1182(a)(2)(A)(i)(II), and an alien convicted of a drug offense is deportable, 8 U.S.C. 1227(a)(2)(B)(i). In *In re Manrique*, 21 I. & N. Dec. 58 (1995), the Board of Immigration Appeals (Board) ruled that "an alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) * * * had he been prosecuted under federal law." *Id.* at 64.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a), 110 Stat. 3009-628, Congress amended the Immigration

and Nationality Act (INA), by adding the following definition:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. 1101(a)(48)(A). In *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000), the Board concluded that its earlier decision in *In re Manrique* had been "superseded" by the new definition of "conviction" in Section 1101(a)(48)(A). See *id.* at 528. Thus, the Board explained that "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Ibid.*

2. Petitioner is a native and citizen of Jamaica who entered the United States without inspection in 1981. Pet. App. 4a. In 1986, she married a United States citizen, and in 1989, she was granted temporary resident status. *Ibid.* In 1991, petitioner was convicted in New York state court of forgery in the third degree. *Id.* at 25a. In 1995, she was convicted in New York state court of criminal possession of a controlled substance in the

seventh degree (cocaine), under N.Y. Penal Law § 220.03 (McKinney 1989), and sentenced to 120 days in jail. Pet. App. 4a-5a. In 1996, the Immigration and Naturalization Service (INS) terminated her status as a temporary resident because of her drug conviction. *Id.* at 5a.

3. In 2007, the Department of Homeland Security charged petitioner with being removable on three grounds: as an alien who was present in the United States without having been admitted or paroled (see 8 U.S.C. 1182(a)(6)(A)(i)); as an alien convicted of a crime involving moral turpitude (*i.e.*, the 1991 forgery conviction) (see 8 U.S.C. 1182(a)(2)(A)(i)(I)); and as an alien convicted of a controlled-substance offense (*i.e.*, the 1995 cocaine conviction) (see 8 U.S.C. 1182(a)(2)(A)(i)(II)). Pet. App. 25a-26a.

Before an immigration judge (IJ), petitioner conceded that she was removable based on her unlawful presence, but contested that she was removable based on her criminal convictions, and she argued that, despite her controlled-substance conviction, she was eligible for discretionary cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 6a, 26a.

While her removal proceedings were pending, petitioner filed a motion in state court to vacate her controlled-substance conviction, or, in the alternative, for a "Certificate of Relief from Disabilities" arising out of that conviction. Pet. App. 6a. In June 2008, the state court denied petitioner's motion to vacate the conviction, but issued a Certificate of Relief from Disabilities, which it believed was warranted for rehabilitative and immigration purposes. *Id.* at 6a, 33a-41a.

In December 2008, the IJ found petitioner removable and rejected her arguments that the state-court certifi-

cate of relief barred the use of her prior drug-possession conviction as a basis for removal or as a basis to make her ineligible for cancellation of removal. Pet. App. 28a-32a.

In September 2009, the Board dismissed petitioner's appeal, agreeing with the IJ that the 1996 definition of "conviction" in 8 U.S.C. 1101(a)(48)(A) prevented the state certificate of relief from removing the immigration consequences of her drug conviction. Pet. App. 19a-22a. The Board specifically agreed with the IJ that the matter was not controlled by the Second Circuit's decision in *Rehman* v. *INS*, 544 F.2d 71 (1976), which held that an alien who received a certificate of relief for a state conviction of drug possession was not "convicted" for immigration purposes if full expungement of a federal conviction would have been available for an analogous prosecution in federal court. Pet. App. 21a. The Board explained that Congress had enacted the new definition of "conviction" after *Rehman* was decided, and the Board had since held that, in light of that definition, no effect was to be given to a state rehabilitative action such as an expungement or certificate of relief, unless the state-court action was predicated on a substantive or procedural defect in the underlying criminal proceeding. *Id.* at 21a-22a; see *In re Roldan-Santoyo*, 22 I. & N. Dec. at 523.

4. Petitioner filed a petition for review in the court of appeals, which denied the petition. Pet. App. 1a-18a. The court rejected petitioner's claim that she had not been "convicted" for immigration purposes. *Id.* at 14a. The court noted that whether the Board's construction of the statute should be upheld was a matter of first impression in the Second Circuit. *Id.* at 13a. It also recognized that the Ninth Circuit had disagreed with five

other circuits on that question. *Id.* at 11a-12a (contrasting the Ninth Circuit's decision in *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (2000), with the decisions in *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157-1158 (2006), adhered to in pertinent part on reh'g, 482 F.3d 1205 (10th Cir. 2007); *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1266-1271 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 328-331 (5th Cir. 2004); *Acosta* v. *Ashcroft*, 341 F.3d 218, 222-227 (3d Cir. 2003); *Gill* v. *Ashcroft*, 335 F.3d 574, 577-579 (7th Cir. 2003)). In order to decide whether a State's rehabilitative action could implicate an implicit exception from the definition of "conviction" in Section 1101(a)(48)(A), the court of appeals assumed without deciding that such an exception exists for aliens who have had *federal* charges dismissed under the FFOA and also that petitioner "would have been eligible for FFOA treatment had she been charged with drug possession in federal court" as opposed to state court. Pet. App. 13a-14a.

The court of appeals then applied the framework under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), for reviewing an agency's interpretation of a statute that it administers. The court concluded that Section 1101(a)(48)(A) is ambiguous with respect to the treatment of convictions subject to rehabilitative treatment, in light of its earlier decision in *Saleh* v. *Gonzales*, 495 F.3d 17 (2d Cir. 2007), which held that "the language of the statute 'permits a spectrum of possible interpretations,' from treating a conviction subject to state rehabilitative relief 'as if it never occurred,' to 'no post-conviction relief whatsoever' for an alien whose offense constitutes grounds for removal." Pet. App. 14a (quoting *Saleh*, 495 F.3d at 22). The court of appeals held that neither the statutory language nor the legislative

history compels the Board to enforce an implied exception for state rehabilitative actions by analogy to the FFOA. *Id.* at 15a. It thus concluded that the Board's refusal to recognize an implied exception to the definition of "conviction" for state rehabilitative actions is rational and consistent with Section 1101(a)(48)(A). *Ibid.* The court rejected petitioner's claim that the Second Circuit's 1976 decision in *Rehman* was controlling after the enactment of the new definition of "conviction," particularly given the deference owed to the agency's interpretation of the new statutory provision. *Id.* at 15a-16a.

Finally, the court of appeals also rejected petitioner's argument that it should follow dictum in *Rehman* to the effect that there is "no sound reason why state policies should not be accorded the same respect as federal leniency policies." Pet. App. 16a (quoting *Rehman*, 544 F.2d at 74). The court explained that Congress could have had a rational basis for distinguishing between aliens whose criminal cases are dismissed under the FFOA and aliens who receive rehabilitative relief under state law. *Id.* at 16a-17a.

ARGUMENT

Petitioner contends (Pet. 13-17) that the court of appeals erred by deferring to the Board's interpretation of the INA, under which her state-court certificate of relief did not eliminate the immigration consequences of her state conviction. The court of appeals' decision and the underlying Board interpretation of the definition of "conviction" in 8 U.S.C. 1101(a)(48)(A) are correct. Moreover, although the Ninth Circuit has disagreed with every other circuit that has addressed the correctness of the Board's refusal to recognize an implicit ex-

ception to the INA's definition of "conviction" for state-law expungements, petitioner's certificate of relief did not, even for state-law purposes, eliminate several consequences of her conviction, making it possible that the result in her case would have been the same even in the Ninth Circuit. In any event, even if this case were an appropriate vehicle for resolving the conflict in the circuits, review by this Court would be premature at this point, because the outlier circuit—the Ninth Circuit—has granted rehearing en banc in a case involving the question. See *Nunez-Reyes* v. *Holder*, 602 F.3d 1102 (2010), reh'g en banc granted, 631 F.3d 1295 (Sept. 24, 2010) (argued Dec. 14, 2010).

1. Petitioner contends (Pet. 15-17) that canons of statutory interpretation—specifically the canon against implied repeals and the canon of constitutional avoidance—should have prevented the court of appeals from upholding the Board's determination that Section 1101(a)(48)(A)'s definition of "conviction" contains no implicit exception for state-law expungements. Petitioner's arguments lack merit.

a. With respect to the statute itself, petitioner contends that Section 1101(a)(48)(A) should not be construed as effecting a "repeal by implication" (Pet. 15) of the FFOA, which makes it possible for someone with a first-time drug offense for simple possession of a controlled substance under 21 U.S.C. 844 to be placed on probation without the entry of "a judgment of conviction," 18 U.S.C. 3607(a).

The plain language of the INA's definition of "conviction" covers proceedings like the one in New York state court involving petitioner's cocaine-possession offense. As relevant here, that definition applies when "the alien has entered a plea of guilty * * * and * * * the judge

has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. 1101(a)(48)(A)(i) and (ii). Petitioner pleaded guilty to possession of cocaine and was sentenced to 120 days in jail. Pet. App. 34a-35a. Her state-court proceeding thus satisfies the terms of the definition. That definition contains no express exception for convictions that have been expunged, and the courts should not infer that such an exception exists. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111 (1983). Moreover, the legislative history strongly indicates that Congress adopted the definition of "conviction" with the intention of limiting the effects of state-law ameliorative practices. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 224 (1996) (explaining that the provision "deliberately broadens the scope of the definition of 'conviction'" because the States have "a myriad of provisions for ameliorating the effects of a conviction"; noting that the definition "clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws"). The Board has thus reasonably determined that there are no exceptions for state-law dispositions that might not be considered a "conviction" for state-law policy reasons. See *In re Salazar-Regino*, 23 I. & N. Dec. 223, 227 (2002); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000).

That result is not altered by the existence of the FFOA, which deals only with individuals who have been prosecuted for drug possession under federal law (see 18 U.S.C. 3607(a)) and thus has no application to aliens who have *state*-court convictions for drug possession. Even in the context of *federal*-court first-time simple-

possession offenses disposed of in accordance with the FFOA, the application of the INA's definition of "conviction" would not have the effect of an implicit *repeal* of the FFOA, because, "even if a disposition under [Section] 3607 counts as a conviction in immigration law, it would not be a conviction for other purposes, such as firearms disabilities." *Gill* v. *Ashcroft*, 335 F.3d 574, 578 (7th Cir. 2003).[1]

Thus, as Judge Graber recently observed, "[i]t is easy to understand why" the Board and nearly every federal court of appeals except the Ninth Circuit "have disagreed with" the view that petitioner advances here. *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring).

b. Petitioner also contends (Pet. 15-16) that the court of appeals failed to consider the equal-protection implications of treating aliens convicted under federal law differently from aliens convicted of similar offenses under state law, where both could qualify for FFOA treatment if they had been convicted under federal law. But the court of appeals correctly considered those concerns by finding that "there arguably is a rational basis for distinguishing between aliens whose criminal cases

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[1] The Board has not determined whether a disposition of a federal prosecution under Section 3607 would constitute a "conviction" under Section 1101(a)(48)(A). See *In re Salazar-Regino*, 23 I. & N. Dec. at 231 n.4; see also *Ramos* v. *Gonzales*, 414 F.3d 800, 806 (7th Cir. 2005) ("Ramos's premise—that someone with a FFOA conviction would escape immigration consequences—is not necessarily correct. We do not know what the [Board] would do if it were confronted with this situation, nor do we know whether its decision would pass legal muster."), cert. denied, 546 U.S. 1170 (2006); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 331 n.12 (5th Cir. 2004) ("We have substantial doubt whether the FFOA controls over the subsequently enacted § 1101(a)(48)(A) [for purposes of a federal prosecution for drug possession under 21 U.S.C. 844].").

are dismissed under the FFOA and aliens who receive Certificates of Relief or similar state rehabilitative relief." Pet. App. 16a.[2]

Even assuming that the FFOA would govern federal convictions, there would be rational bases for treating state convictions differently, and thus no equal protection violation. As the Third Circuit observed in *Acosta* v. *Ashcroft*, 341 F.3d 218 (2003) (Alito, J.), Congress is "[f]amiliar with the operation of the federal criminal justice system." *Id.* at 227. "Congress could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present a substantial threat of committing subsequent serious crimes," but it may have been "unfamiliar with the operation of state schemes that resemble the FFOA," and therefore "could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law." *Ibid.* Moreover, as Judge Graber has explained, Congress could also have rationally based its distinction on the fact that, because some States do not provide for expungement, an interest in uniformity would counsel against "recogniz[ing] *any* state expungements, rather than adopt[ing] a piecemeal approach" that would make persons "ineligible for relief under the immigration

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[2] The court of appeals also "assume[d], without deciding, that an exception to the definition of 'conviction' provided in [Section 1101(a)(48)(A)] exists for aliens whose federal charges are dismissed under the FFOA." Pet. App. 13a. If the Board were to reach a contrary result on the provision's applicability to federal drug-possession convictions (see note 1, *supra*), there could be no equal-protection concern in the Board's refusal to except state-law convictions.

laws" on the basis of where they were convicted. *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring).

Particularly given Congress's broad "power in immigration matters," there is "plain[ly]" a rational basis for a distinction between federal and state convictions. *Acosta*, 341 F.3d at 227; accord *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1272 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004). As a result, petitioner's equal protection argument lacks merit.

2. As petitioner notes (Pet. 10-11), and as the court of appeals acknowledged (Pet. App. 11a-12a), there is currently a lopsided conflict in the circuits about the correctness of the Board's decision in *In re Roldan-Santoyo*, *supra*, in which the Ninth Circuit stands alone in concluding that a state-law expungement may prevent a conviction for certain drug offenses from being considered a "conviction" for immigration purposes under Section 1101(a)(48)(A).[3] This Court has previously denied review in cases involving that question. See *Altamirano Hernandez* v. *Gonzales*, 549 U.S. 1111 (2007) (No. 06-318); *Ramos* v. *Gonzales*, 546 U.S. 1170 (2006) (No. 05-467).

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[3] Eight Circuits (the First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh) have explicitly disagreed with the Ninth Circuit, or have otherwise accepted the Board's interpretation of 8 U.S.C. 1101(a)(48)(A). Compare *Herrera-Inirio* v. *INS*, 208 F.3d 299, 304-306 (1st Cir. 2000); Pet. App. 13a-17a (2d Cir.); *Acosta*, 341 F.3d at 222-227 (3d Cir.); *Madriz-Alvarado*, 383 F.3d at 328-231 (5th Cir.); *Gill*, 335 F.3d at 577-579 (7th Cir.); *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 697 (8th Cir. 2002); *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157-1158 (2006), adhered to in pertinent part on reh'g, 482 F.3d 1205 (10th Cir. 2007); and *Resendiz-Alcaraz*, 383 F.3d at 1266-1271 (11th Cir.), with *Lujan-Armendariz* v. *INS*, 222 F.3d 728, 749 (9th Cir. 2000).

Petitioner contends (Pet. 17-18) that this case "presents a suitable vehicle for resolving the conflict," because "[i]t should be beyond dispute that [she] would have been eligible for cancellation of removal under the Ninth Circuit's decision in *Lujan-Armendariz*." In fact, it is not clear that petitioner would be eligible for relief in the Ninth Circuit. That court has recognized that "exceptions contained in [a State's] expungement statute" may prevent an alien from being eligible for relief under *Lujan-Armendariz*. *Ramirez-Altamirano* v. *Holder*, 563 F.3d 800, 812 (9th Cir. 2009) (finding "the minimal, residual consequences of [the alien's] conviction under [California] law" in that case did not prevent the alien from qualifying for relief under *Lujan-Armendariz*, if the Board were to determine that his jail sentence did not preclude him from qualifying for expungement under the FFOA, but not ruling out that state-law exceptions to the scope of rehabilitation could be "relevant").

Although petitioner repeatedly refers to her New York Certificate of Relief as an "expungement" of her conviction, it provided a narrower form of rehabilitation. Petitioner moved the state court to vacate her conviction, or in the alternative, for a Certificate of Relief from Disabilities under N.Y. Correct. Law § 701 (McKinney Supp. 2008). See Pet. App. 6a, 26a. The state court denied the motion to vacate, but granted the request for a Certificate of Relief. *Id.* at 6a, 33a-41a. Nothing in the New York statute indicates that its application operates to expunge, vacate, dismiss, or otherwise eliminate a conviction; instead, it merely provides that a conviction will not be deemed "a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise

any right, or a disability to apply for or to receive any license, permit, or other authority or privilege covered by the certificate." N.Y. Correct. Law § 701(2) (McKinney Supp. 2008). As the Second Circuit has previously recognized, "[u]nder New York law, even though a Certificate of Relief is designed to mitigate the consequences of that conviction, it 'does not eradicate or expunge the underlying conviction.'" *Mugalli* v. *Ashcroft*, 258 F.3d 52, 62 (2001) (quoting *Morrisette* v. *Dilworth*, 452 N.E.2d 1222, 1223 n.2 (N.Y. 1983)).[4]

Thus, the rehabilitation that petitioner received under New York law was not as complete as that in *Ramirez-Altamirano*, where California law had released the alien from "all penalties and disabilities," with certain minor exceptions. 563 F.3d at 812 (citation omitted). Petitioner's relief was also far less complete than the relief that someone guilty of a federal drug-possession offense could have received under the FFOA. See 18 U.S.C. 3607(b).[5] As a result, it is by no means clear that she would be entitled to relief in the Ninth Circuit, which would make this case a poor vehicle for resolving the current conflict in the courts of appeals.

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[4] The New York statute specifically provides that a certificate of relief does not provide relief affecting the "right of such person to retain or to be eligible for public office" (N.Y. Correct. Law § 701(1) (McKinney Supp. 2008)), or licensing actions (*id.* § 701(3)), and the New York Attorney General has opined that a certificate of relief does not affect whether a conviction may be considered when evaluating qualifications as a juror, *Opinion No. F 91-10*, 1991 Op. N.Y. State Att'y Gen. 38, 1991 WL 499877 (Dec. 31, 1991).

[5] Even if the limitations on the scope of petitioner's rehabilitation under New York law would not prevent her from receiving relief in the Ninth Circuit, they further vitiate her equal protection argument, because she "simply did not obtain relief analogous to that provided by the FFOA." *Ramirez-Altamirano*, 563 F.3d at 818 (Ikuta, J., dissenting).

3. In any event, even if this were an appropriate vehicle for resolving the current conflict, review of the question now would be especially premature, because the Ninth Circuit granted the government's petition for rehearing en banc in a case involving the question on September 24, 2010. See *Nunez-Reyes* v. *Holder*, 631 F.3d 1295. The en banc court heard oral argument in that case on December 14, 2010, and its decision could eliminate the conflict. See *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring) ("[W]ere we to reconsider our rule en banc, I would join our sister circuits' unanimous recognition that Congress reasonably distinguished between aliens subject to a state expungement and aliens subject to a federal expungement."); *id.* at 1105 (Graber, J., concurring) (citing opinions by Judges Ikuta and Fernandez suggesting that the Ninth Circuit's current approach is incorrect or should be revisited).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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